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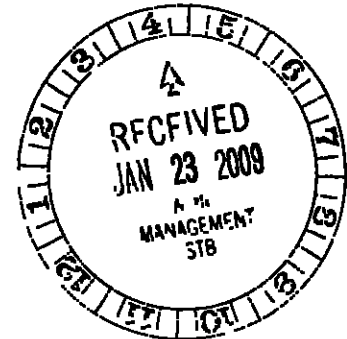
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January 23, 2009

**VIA HAND DELIVERY**

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423



**Re: STB Docket NOR 42111, *Oklahoma Gas & Electric Company*  
*v. Union Pacific Railroad Company***

Dear Ms. Quinlan,

Enclosed for filing in the above-captioned case please find the Opening Evidence of Oklahoma Gas & Electric Company ("OG&E"). The original and ten (10) copies are enclosed. An additional copy is included for date-stamping and return via our messenger.

Please note that the Opening Evidence contains Confidential Information which is redacted from the Public Version. Therefore, OG&E is also filing, under seal and pursuant to the Protective Order in effect for this proceeding, the original and ten (10) copies of the Confidential Version. An additional copy of the Confidential Version is also enclosed for date-stamping and return via our messenger.

OG&E has also enclosed three (3) compact disks which contain the Public Version, and three (3) compact disks which contain the Confidential Version, as well as all workpapers and exhibits.

Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Thomas W. Wilcox".

Thomas W. Wilcox

ENTERED  
Office of Proceedings

Enclosure

JAN 23 2009

Part of  
Public Record

cc Michael L. Rosenthal, Esq. (counsel for Defendant)  
Patrick D. Shore, Esq.  
Allen F. Gould

ATLANTA HONG KONG LONDON NEW YORK NEWARK NORFOLK RALEIGH  
RICHMOND SHANGHAI TYSONS CORNER VIRGINIA BEACH WASHINGTON DC

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

OKLAHOMA GAS & ELECTRIC COMPANY

Complainant.

v.

UNION PACIFIC RAILROAD COMPANY

Defendant.

Docket NOR 42111

**OPENING EVIDENCE**

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**Part of  
Public Record**

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Dated: January 23, 2009

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

OKLAHOMA GAS & ELECTRIC COMPANY	)	
	)	
Complainant,	)	
	)	
v.	)	Docket NOR 42111
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	
	)	

**OPENING EVIDENCE**

Complainant Oklahoma Gas & Electric Company ("OG&E") hereby submits its Opening Evidence pursuant to the procedural schedule issued by the Surface Transportation Board ("Board" or "STB") on December 3, 2008 in this case.

Docket NOR 42111

### **Counsel's Argument and Summary of Evidence**

Rail service provided by UP from the SPRB to the Muskogee Station occurred on a contract basis prior to 2009. The parties were unable to agree on a replacement contract, despite over 12 months of negotiations, and on October 7, 2008 OG&E submitted a formal request to UP

in accordance with 49 USC § 11101 and 49 CFR Part 1300 to establish common carrier rates and service terms for the movement of coal by UP from the SPRB to Muskogee Station. UP eventually responded to this request by establishing applicable rates and terms on October 31, 2008 as shown in Exhibit I-1.<sup>1</sup> UP also stated that it would publish the rates and terms set out in Exhibit I-1 in a new price document “on or before December 11, 2008,” but also stated that UP “may publish rates or terms that are different . . . subject to notice requirements.” *Id*

On or around December 15, 2008, UP published Item 5400 of “UP Tariff 4221, Unit Train Coal Common Carrier Tariff” (“Tariff 4221”) on its website. Item 5400 of Tariff 4221 revised the rates and service terms for service to Muskogee Station in OG&E-supplied rail cars that UP had established on October 31. On December 28, 2008, UP published Tariff 4221, Item 5400-A, which amended Item 5400 to add rates and service terms for transportation by UP in UP-supplied rail cars from the SPRB mine origins to the Muskogee Station. Exhibit I-2 On January 1, 2009 OG&E began shipping coal to Muskogee Station under the rates and service terms of Tariff 4221 and Item 5400-A.

As explained and confirmed in a letter filed by OG&E with the Board on January 6, 2009, the Complaint in this case encompasses all future iterations and successors of the UP rates established for the transportation of coal to the Muskogee Station in response to OG&E’s initial request. Tariff 4221, including Item 5400-A, is the most recent issued by UP and currently governs the UP transportation of coal to the Muskogee Station in common carrier service. Hence, in this Opening Evidence, OG&E demonstrates the unreasonableness of all rates included in Tariff 4221, Item 5400-A.

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<sup>1</sup> Letter from Jeffrey Maier to Allen Gould, dated October 31, 2008.

## **B. Procedural History**

OG&E filed its Complaint on November 7, 2008, and, pursuant to 49 C.F.R. §1111.1(a), stated that the reasonableness of the common carrier rates established by UP should be examined using the constrained market pricing ("CMP") procedures developed under *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985). Complaint at ¶18. However, it was apparent from OG&E's initial assessment of the case that a CMP analysis pursuant to the Board's rules and precedents would produce maximum reasonable rate levels significantly below the jurisdictional threshold as calculated pursuant to the Board's current procedures. The parties' discussions and correspondence on this issue culminated in them filing a Joint Stipulation and Report on the Parties' Conference Pursuant to 49 C.F.R. § 1111.10(b) on November 21, 2008 ("Joint Stipulation"). Exhibit I-3. In the Joint Stipulation, UP waived its right to claim that a Stand-Alone Cost ("SAC") analysis would justify maximum reasonable rates greater than 180% of UP's variable costs. *Id.* at 1. UP also waived its right to dispute whether it has qualitative market dominance over the transportation of coal to the Muskogee Station from UP-served SPRB mines. *Id.* at 2. The parties also stipulated that the only issue for the Board to decide in this case is whether the challenged rates exceed the Board's jurisdictional threshold of 180%, and, if so, what the maximum reasonable rates should be. *Id.* In addition, the parties agreed that the time period for the traffic and operating characteristics used to initially calculate UP's variable costs in this case pursuant to the Board's procedures was November 1, 2007 to October 31, 2008. Lastly, the parties proposed a protective order and an abbreviated procedural schedule in light of the Joint Stipulation.

UP filed its Answer to the Complaint on December 1, 2008. In addition to restating the waivers it made in the Joint Stipulation, UP also alleged that the challenged rates are reasonable

and that the Board does not have jurisdiction to review the challenged rates because they produce revenues less than 180% of variable costs

In a decision issued December 3, 2008, the Board adopted the parties' requested procedural schedule and issued the requested protective order.

As this case has progressed, the parties have engaged in discovery and conferred regarding the nine inputs to the Uniform Rail Costing System ("URCS") Phase III model that is used by the Board to determine a railroad's variable costs of providing rail service. *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket NOR 42095, slip op. at 6 (served May 19, 2008) ("KCPL v. UP"); *Major Issues in Rail Rate Cases*, Ex Parte 657 (Sub-No 1), slip op. at 47-48 (served Oct 30, 2006). The parties were able to reach agreement on the nine inputs for the period November 1, 2007 to October 31, 2008 and filed a Joint Submission of URCS Phase III Operating Characteristics for all rates and movements included in Tariff UP-4221, Item 5400-A on January 9, 2009 ("Joint Submission"). Exhibit I-4. The parties requested that the Board use the nine inputs supplied for each movement for the initial calculation of UP variable costs and the jurisdictional thresholds in this case.

### **C. Summary of Evidence and Requests for Relief**

In this proceeding UP has conceded that it has qualitative market dominance over the transportation covered by the Complaint, the parties have stipulated that the maximum reasonable rates for this transportation are the jurisdictional thresholds for each rate under 49 U.S.C. §10707(d)(1)(A), and the parties do not dispute the nine operating inputs that should be used by the Board to initially calculate UP's variable costs and the jurisdictional thresholds. Consequently, the evidence in this proceeding will be limited to (1) the proper calculation of UP's variable costs to determine the jurisdictional threshold for each rate as of January 1, 2009

by indexing the UP URCS ("URCS") Phase III 2007 variable costs to 1Q09 levels; and (2) the appropriate procedure to ensure that the maximum reasonable rates remain at the jurisdictional threshold levels over the 10-year prescription period, given the time lag associated with data needed to calculate UP's Phase III variable costs

In this Opening Evidence, OG&E has applied indexing procedures accepted by the Board to calculate estimates of UP's variable costs and the applicable jurisdictional thresholds for each of the movements covered by the Complaint as of January 1, 2009. For each and every movement the rates established by UP in Tariff LP-4221, Item 5400-A exceed the jurisdictional threshold, and all are therefore unreasonable under 49 USC §§ 10701, 10702, 10704, and 10707 and controlling precedent. *See* Table II-A-1. OG&E therefore asks the Board to (1) prescribe the maximum reasonable rates for the transportation of coal by UP from mines it serves in the SPRB to the Muskogee Station at the jurisdictional thresholds as calculated by OG&E; and (2) order that reparations be paid by UP to OG&E for amounts it has paid above such rate levels starting January 1, 2009, plus applicable interest. OG&E also requests that the Board adopt the process set forth below in Section II-A-2-b-ii to ensure that the maximum reasonable rates for this transportation adhere as closely as possible to UP's Phase III variable costs of providing this service over the 10-year prescription term.



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**OKLAHOMA GAS & ELECTRIC COMPANY**

**Complainant,**

**V.**

**UNION PACIFIC RAILROAD COMPANY**

**Defendant.**

Docket NOR 42111

## II.

### Market Dominance

The Board's authority to review common carrier transportation rates under 49 USC §§ 10701(d), 10702, 10704 and 10707 is limited to those situations where the railroad providing the transportation is market dominant 49 USC § 10701(d)(1). Market dominance consists of both qualitative aspects and quantitative aspects. Qualitative market dominance is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 USC § 10707(a). Meanwhile, quantitative market dominance means that the challenged rate exceeds 180% of the variable costs of providing the relevant rail service 49 USC § 10707(d)(1)(A).

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Docket NOR 42111

## II-A

### **Market Dominance – Quantitative Evidence**

As demonstrated in this section, UP possesses quantitative market dominance because the challenged rates produce revenues in excess of 180% of UP's variable costs of providing rail service from the SPRB to the Muskogee Station. Due to the parties' stipulation that the prescribed rates should be set at the jurisdictional threshold, the Board should order that the maximum reasonable rates are prescribed at 180% of UP's variable costs as shown in Table II-A-1 below.

### 1. Variable costs

In this Part II-A, OG&E calculates UP's variable costs of providing rail service to the Muskogee Station and the prescribed rates that should be established for the first quarter of 2009. The variable costs calculated herein are necessarily estimates of UP's actual 1Q09 costs because the component inputs to the Board's URCS index to 1Q09 levels are estimates, and the actual 1Q09 indices will not be available until 2Q09. In Part II-A-2-b-ii below, OG&E describes a

process for reconciling the maximum reasonable rates paid by OG&E commencing January 1, 2009 with the actual maximum reasonable rate levels that are later calculated.

The variable costs presented herein are calculated individually for each mine from which UP transported coal to the Muskogee Station from November 2007 through October 2008. For origin mines to which the challenged rates apply but from which OG&E did not purchase coal within this time period, the parties' Joint Submission used average operating characteristics for the nine inputs, and therefore OG&E used the average shipment characteristics to calculate variable costs at 1Q09 levels for these rates. *See* Exhibit II-A-1 and Exhibit II-A-2

OG&E's calculation of the UP variable costs is based on the most recent URCS Phase III model adopted by the Board – the 2007 model indexed to the first quarter of 2009. The URCS Phase III model provides carrier-specific unit costs for UP's rail service.

## **2. Rates and resulting R/VC calculations**

### **a. Results**

OG&E's calculations of the unadjusted URCS variable cost demonstrate that the ratio of revenue to variable costs for transportation from the SPRB mines produced by the challenged rates contained in Tariff 4221, Item 5400-A are between 198.8% and 200.4% for the 1Q 2009 time period in shipper-provided railcars and 199.1% and 200.9% in railroad-provided railcars for the same time period.

OG&E's calculation of UP's variable cost of transporting coal from the PRB to the Muskogee Station is based on the following approach:

- An analysis of nine (9) inputs required by the Board to be used for an URCS Phase III analysis:
  1. the railroad;
  2. loaded miles (including loop track miles),
  3. shipment type (local, originated delivered, bridge, received terminated),
  4. number of freight cars,

- 5 tons per car;
  - 6 commodity (for loss and damage expense only);
  7. type of movement (single, unit, multiple);
  8. car ownership (railroad or private); and
  9. type of car.
- The use of 2007 URCS variable cost data for UP indexed to 1Q 2009 price levels.

As stated above, the challenged rates took effect on January 1, 2009, and since that date OG&E has been paying the rates applicable to transportation from the SPRB mines from which it has purchased coal thus far in 2009. The results of OG&E's calculations of variable costs for transporting coal from the PRB to the Muskogee Generating Station for 1Q09, and the corresponding jurisdictional threshold calculation, are summarized in Table II-A-1 below:

**TABLE II-A-1**  
**Summary of Rate, Variable Cost, Ratio of Revenue to Variable Cost and**  
**Prescribed Rate for Orin Subdivision Mines to the Muskogee Generating Station – 1Q 2009**

<u>Origin</u> (1)	<u>Period</u> (2)	<u>Tariff rate/ton</u> (3)	<u>UP VC</u> (4)	<u>R/VC percent</u> (5)	<u>JT 1/</u> (6)
<b><u>Shipper Provided Railcars</u></b>					
1 Antelope	1Q09	\$18.75	\$9.40	199.5%	\$16.92
2. Belle Ayr	1Q09	\$19.67	\$9.86	199.5%	\$17.75
3 Black Thunder	1Q09	\$19.17	\$9.62	199.3%	\$17.32
4. Black Thunder South	1Q09	\$19.05	\$9.56	199.3%	\$17.21
5. Caballo	1Q09	\$19.70	\$9.83	200.4%	\$17.69
6 Caballo Rojo	1Q09	\$19.64	\$9.80	200.4%	\$17.64
7 Coal Creek	1Q09	\$19.49	\$9.74	200.1%	\$17.53
8 Cordero	1Q09	\$19.53	\$9.76	200.1%	\$17.57
9 Jacobs Ranch	1Q09	\$19.17	\$9.64	198.9%	\$17.35
10 North Antelope	1Q09	\$18.81	\$9.46	198.8%	\$17.03
11 Rochelle	1Q09	\$18.81	\$9.45	199.0%	\$17.01
12. Thunder West	1Q09	\$19.23	\$9.66	199.1%	\$17.39
<b><u>Railroad Provided Railcars</u></b>					
13. Antelope	1Q09	\$21.11	\$10.57	199.7%	\$19.03
14. Belle Ayr	1Q09	\$22.14	\$11.09	199.6%	\$19.96
15 Black Thunder	1Q09	\$21.58	\$10.82	199.4%	\$19.48
16 Black Thunder South	1Q09	\$21.45	\$10.75	199.5%	\$19.35
17 Caballo	1Q09	\$22.17	\$11.04	200.8%	\$19.87
18 Caballo Rojo	1Q09	\$22.12	\$11.01	200.9%	\$19.82
19 Coal Creek	1Q09	\$21.94	\$10.94	200.5%	\$19.69
20 Cordero	1Q09	\$21.99	\$10.96	200.6%	\$19.73
21. Jacobs Ranch	1Q09	\$21.58	\$10.82	199.4%	\$19.48
22 North Antelope	1Q09	\$21.18	\$10.64	199.1%	\$19.15
23. Rochelle	1Q09	\$21.18	\$10.64	199.1%	\$19.15
24 Thunder West	1Q09	\$21.65	\$10.86	199.4%	\$19.55

1/ Jurisdictional Threshold Column (4) x 1.8

Details of the calculations shown in Table II-A-1 are discussed below, shown in Exhibit II-A-1 and Exhibit II-A-2, and found in OG&E's workpapers "OGE Muskogee Phase III.xls" and "Exhibit II-A-1 and II-A-2.xls".

**b. Traffic and operating characteristics for URCS calculation**

OG&E has used the URCS Phase III costing procedures described below to calculate the variable costs for the movement of coal from the SPRB to the Muskogee Station.

**i. URCS Phase III inputs**

As described above, OG&E and UP agreed to the nine (9) URCS Phase III inputs used to calculate the variable costs and jurisdictional threshold for each movement covered by the Complaint. *See* Exhibit I-4.

**ii. Indexing**

URCS is calculated on an annual basis, and the most recent URCS statistics are those for 2007. In order to determine the variable costs for the first quarter of 2009, OG&E has indexed the 2007 costs that it developed using the Board's 2007 UP URCS Phase III model to reflect the estimated 1Q 2009 wage and price levels. The Board's normal indexing procedures utilize actual historic price indices developed by the Association of American Railroads ("AAR") to index crew wages, wage supplements, materials and supplies, and fuel expenses. All other indexable expenses are adjusted using the change in the Producer Price Index – All Commodities ("PPI") calculated by the United States Department of Labor Bureau of Labor Statistics ("BLS") *See* the Interstate Commerce Commission's IE3-80 indexing procedures supplemented by *Complaints Filed Under Section 229 of the Staggers Rail Act of 1980*, Ex Parte No. 411, 365 I.C.C. 507 (1980); and *Wisconsin Power & Light Company v. Union Pacific Railroad Company*, Docket NOR 42051, slip op. at 59 (served September 13, 2001). However, because the AAR

and BLS will not have the actual 1Q 2009 indices available until after the submission of Opening and Reply Evidence in this proceeding, it is necessary to estimate the appropriate 1Q 2009 indices for these stages of the proceeding.

To forecast expected AAR wage, wage supplements, materials and supplies, and fuel indices, OG&E relied upon the forecasted railroad expense indices developed by the AAR for its estimation of the 1Q 2009 Rail Cost Adjustment Factor ("RCAF") and filed with the Board in Ex Parte 290 (Sub-No. 5) (2009-1), *Quarterly Rail Adjustment Factor*. The AAR's calculations form the basis of the STB's RCAF calculation and reflect expected changes in railroad expense prices.<sup>2</sup> For the PPI, OG&E utilized the forecasted PPI for January, February, and March 2009 developed by the Energy Information Administration ("EIA") and published in its January 13, 2009 *Short-Term Energy Outlook*.<sup>3</sup> The Board has repeatedly indicated its preference for the use of impartial forecasts produced by the EIA in maximum reasonable rate proceedings. *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, Docket NOR 42056, slip op. at 29 (served March 24, 2003); *Duke Energy Corporation v. Norfolk Southern Railway Company*, Docket NOR 42069, slip op. at 64 (served November 6, 2003), *Duke Energy Corporation v. CSX Transportation, Inc.*, Docket NOR 42070, slip op. at 48 (served February 4, 2004).

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<sup>2</sup> OG&E used the AAR's calculations of the input factors for the RCAF instead of the Board's final RCAF calculation because the AAR's workpapers include separate indices for wages and wage supplements. The Board's final calculation only includes an index for "Labor" which combines wages and wage supplements.

<sup>3</sup> The URCS index was developed in electronic workpaper "UP07 Phase III Index to 1Q 2009.xls."

OG&E notes further that the composite index that it utilized for indexing is a price index, not a cost index. Thus, no adjustments for railroad productivity are reflected in the indexing process.<sup>4</sup>

The parties in this case have stipulated that the maximum reasonable rates should be set at the jurisdictional threshold of 180% of UP's variable costs of providing the service. However, because the URCS Phase III costing model, the AAR and BLS price indexes used to index the resultant variable costs, and the operating characteristics used as inputs into the URCS Phase III costing model all rely upon historical data for their derivation, there is an inevitable lag between the beginning of a new quarter and the final calculation of UP's variable costs and corresponding jurisdictional thresholds for the applicable time period.

In order to ensure that the variable costs and jurisdictional thresholds over the prescriptive period in this proceeding are based on UP's URCS Phase III costs, OG&E proposes that the Board adopt the following procedures for the parties to follow after the initial determination of the maximum reasonable rates commencing 1Q09 as calculated by OG&E and set forth in Table II-A-1.

1. Each 1Q 2009 rate, henceforth known as the "Annual Effective Rate," will remain in effect through 1Q 2010, when URCS Phase III variable costs will be calculated for each quarter in 2009 using the 2008 URCS Phase III costing model, actual 2009 quarterly operating characteristics, and AAR and BLS indexes;
2. The parties will exchange their calculations of quarterly operating characteristics and variable costs for 2Q 2009 through 4Q 2009. If an

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<sup>4</sup> Productivity adjustments and their impact have been repeatedly recognized by the Board and others. See *Railroad Cost Recovery Procedures-Productivity Adjustment*, Ex Parte 290 (Sub-No. 4), 5 I C C. 2d 434 (served March 24, 1989), *Railroad Accounting Principles, Final Report* by Railroad Accounting Principles Board, September 1, 1987; Ex Parte 290 (Sub-No. 4), *Improving Railroad Productivity*, Final Report of the Task Force on Railroad Productivity, A Report to the National Commission on Productivity and the Council of Economic Advisors, Washington, D.C., November 1973. See also ICC, *Proceedings Productivity Measurement Conference*, November 26, 1974.



agreement on the characteristics and/or variable costs cannot be reached, the parties will submit the dispute to the Board for resolution,

3. Once the quarterly variable costs and jurisdictional thresholds from Step 2 have been calculated, the parties will reconcile these rates with the prior year's Annual Effective Rate from Step 1. The parties will exchange their reconciled, or "true-up" calculations, and, if they cannot reach an agreement on the revised rates, will submit their dispute to the Board for resolution. Any net underpayments for the year will be made by OG&E to UP, while UP will refund to OG&E any net overpayments for the prior year. The party which is due monies from the above reconciliation will also be entitled to interest on the overpayment or underpayment calculated in accordance with 49 CFR Part 1141; and
4. The final 4Q 2009 will become the new Annual Effective Rate, at which time the reconciliation process will begin in 1Q 2011, and continue until the expiration of the Board's rate prescription in 2019. For those origins for which OG&E did not transport coal in 4Q 2009, jurisdictional threshold rates will be calculated based on the average operating characteristics for all movements in 4Q 2009.

#### **c. Results**

When compared with the challenged rates set by Tariff 4221, Item 5400-A, UP's variable costs produce revenue-to-variable cost ratios that range from 198.8% to 200.4% in shipper-provided railcars and 199.1% to 200.9% in railroad-provided railcars. Revenue-to-variable cost ratios for all movements are greater than 180%. See Table II-A-1.

#### **d. Reparations**

The evidence presented above demonstrates that UP owes reparations (and interest) to OG&E for shipments made under the challenged rates from January 1, 2009 until the date OG&E begins paying the maximum reasonable rates as prescribed by the Board in this proceeding.

**BEFORE THE  
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**Defendant.**

Docket NOR 42111

## II-B

### Market Dominance - Qualitative

In this case, UP has waived its right to dispute the fact that it has qualitative market dominance over the transportation of coal from the SPRB to the Muskogee Station. *See* Exhibit I-3 at 1-2; UP Answer at ¶ 14. Hence, qualitative market dominance is stipulated and need not be addressed by OG&E in this Opening Evidence or by the Board.

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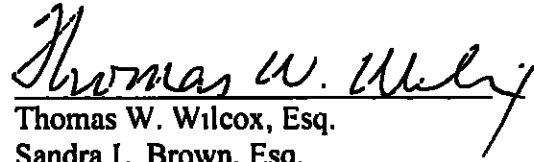
Docket NOR 42111

### III.

### **Stand-Alone Cost**

As stated in Part I, UP has waived the right to argue that a SAC analysis would produce maximum reasonable rates in excess of 180% of UP's variable costs of providing rail service to the Muskogee Station. See Exhibit I-3 at 1; UP Answer at ¶ 18. The parties have stipulated that the prescribed rates should be set at the jurisdictional threshold, and that a SAC analysis would not be necessary in this case.

Respectfully submitted,

A handwritten signature in cursive script, reading "Thomas W. Wilcox". The signature is written in black ink and is positioned above the printed name and address.

Thomas W. Wilcox, Esq.

Sandra L. Brown, Esq.

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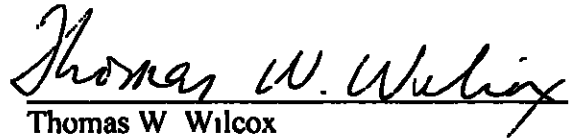
*Attorneys for Complainant Oklahoma Gas &  
Electric Company*

January 23, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of January 2009, I served a copy of the foregoing Opening Evidence by hand delivery, upon counsel for the Defendant at the following address.

Linda J. Morgan, Esq.  
Michael L. Rosenthal, Esq.  
Covington & Burling LLP  
1201 Pennsylvania Avenue NW  
Washington, DC 20004

  
Thomas W Wilcox

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

OKLAHOMA GAS & ELECTRIC COMPANY	)	
	)	
Complainant,	)	
	)	
v	)	Docket NOR 42111
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	

**IV.**

**Witness Qualifications and Verifications**

This part contains the Statement of Qualifications of the witness who is responsible for the market dominance, variable cost, and jurisdictional threshold portions of OG&E's Opening Evidence in Part II above, as well as the tables, exhibits, and workpapers referenced therein.

**THOMAS D. CROWLEY**

Mr. Crowley is an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, marketing, and transportation issues. The specific evidence Mr. Crowley is sponsoring relates to *quantitative market dominance and UP's variable cost of transporting the traffic covered under the Complaint (Part II-A)*. Due to the parties' stipulation in this case, the evidence sponsored by Mr. Crowley also generates the rates that should be prescribed by the Board.

Mr. Crowley is a graduate of the University of Maine from which he obtained a Bachelor of Science degree in Economics. He has also taken graduate courses in transportation at George Washington University in Washington, D.C. He spent three years in the United States Army and

since February 1971 has been employed by L. E. Peabody & Associates, Inc. He is a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association

Mr. Crowley has organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies he has participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled him to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business

Additionally, he has inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from the Powder River Basin to various utility destinations in the Midwestern and Western portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal, both inbound raw materials and outbound paper products to and from paper mills, crude and pelletized iron ore, crushed stone, soda ash, aluminum, fresh fruits and vegetables, TOFC/COFC traffic and numerous other commodities handled by rail.

Mr. Crowley has frequently been called upon to develop and coordinate economic and operational studies relative to the acquisition of coal and the rail transportation of coal on behalf of electric utility companies. His responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. He has also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various coal shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts, which optimize operational efficiency and cost effectiveness.

Mr. Crowley has presented evidence before the Interstate Commerce Commission ("ICC") in *Ex Parte No 347 (Sub-No 1), Coal Rate Guidelines – Nationwide*, which is the proceeding that established the methodology for developing a maximum rail rate based on stand-alone costs. He has submitted evidence applying the ICC's stand-alone cost procedures in every proceeding before the ICC and its successor the Surface Transportation Board.

Moreover, Mr. Crowley has developed numerous variable cost calculations utilizing the various formulas employed by the ICC/STB for the development of variable costs for common carriers, with particular emphasis on the basis and use of Rail Form A and its replacement costing formula the Uniform Railroad Costing System ("URCS"). He has utilized Rail Form A/URCS costing principles since the beginning of his career with L. E. Peabody & Associates Inc. in 1971.

Mr. Crowley frequently presented both oral and written testimony before the Interstate Commerce Commission, Surface Transportation Board, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the



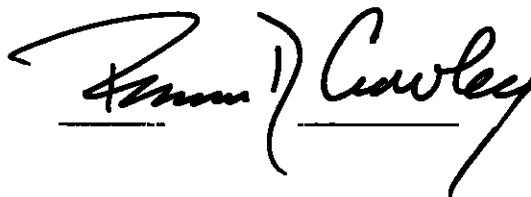
development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. He has presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. He has also presented testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, Mr. Crowley has been actively involved in negotiating transportation contracts on behalf of coal shippers. Specifically, he has advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement-specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity, and cost-based ancillary charges.

He has participated in various proceedings involved with the division of through rail rates. For example, Mr. Crowley participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v Aberdeen and Rockfish Railroad Company, et al*, which was a complaint filed by the Northern and Midwestern rail lines to change the primary north-south divisions. He was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the Northern and Midwestern rail lines. He was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company*

**VERIFICATION**

I, Thomas D Crowley, verify under penalty of perjury that I have read the Opening Evidence of Oklahoma Gas & Electric Company in this proceeding that I have sponsored, as described in the foregoing Statement of Qualifications, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in black ink, appearing to read "Tom D Crowley", written over a horizontal line.

Executed on January 23, 2009

# EXHIBITS

# EXHIBIT I-1



October 31, 2008

Mr. Allen F. Gould  
Manager Fuels  
OGE Energy Corporation  
420 South Broadway  
Oklahoma City, OK 73109

Dear Allen,

This letter responds to your request for common carrier rate(s) to cover the movement of coal from UP-served mines in the Southern Powder River Basin (SPRB), WY to the Muskogee Generating Station, located at or near Ft. Gibson, Oklahoma (Destination).

The rates and applicable terms are stated on Attachment A. The rates are stated as if they were published and effective beginning in November, 2008. Since contract rates exist currently under contract WRPI 0151, we will publish the rates and terms in a new price document on or before December 11, 2008. As you may know, common carrier rates are subject to change at any time so long as twenty (20)-days notice is provided for any increase; therefore, when we publish common carrier rates or terms to be effective January 1, 2009, we may publish rates or terms that are different from those specified in the attachment, subject to notice requirements.

There is no provision for liquidated damages as there is no minimum volume requirement or service commitment beyond common carrier reasonable dispatch.

If you have any questions, please let me know.

Best Regards,

A handwritten signature in black ink, appearing to be "JW Malar".

Jeff W. Malar  
Assistant Vice President - Energy

UNION PACIFIC RAILROAD  
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260  
ph. (402) 544-4500 fx. (402) 233-3039  
jwmalar@up.com

**ATTACHMENT A**  
**Response to Request for Common Carrier Rates**  
**Rates and Service Terms to Be Published in Price Document**

**Effective Date:** January 1, 2009

**Route:** UP direct from origin mines specified in rates to OG&E'S Muskogee Generating Station ("Destination")

**Volume:** Maximum annual volume 7,000,000 tons per calendar year  
No minimum volume applies

**Annual Volume Estimate:** For planning purposes, Shipper will advise Railroad of its intent to ship under these rates as specified in the Monthly Coal Tonnage Forecast (see UP Circular 6603-series Item 250). In addition, not later than December 1, 2008, and July 1, in subsequent years, Shipper shall provide to Railroad an estimate of tons of Coal anticipated to be loaded in the next calendar year by month ("Annual Volume Estimate"). This information should include tons from each of its suppliers and origins as soon as it is known. The nominated tonnage must be ratable. A monthly nomination is ratable if it is no more than 10% greater or 10% less than one-twelfth of the annual total. The Annual Volume Estimate must be submitted electronically via UP's secured website ([www.uprr.com/customers/energy](http://www.uprr.com/customers/energy) Bulk Train Planner.)

**Equipment:** Shipper will supply suitable equipment at no charge to UP. The number of trainsets in service for transporting coal to Destination shall not exceed nine (9), but Railroad reserves the right, in its sole judgment, to limit the number of trainsets that will be in service in order to retain fluidity or to meet loading schedules, or if adding trainsets in active service would not materially increase delivered tonnage.

Railcars shall be compatible with the loading facility and unloading facility. All railcars shall be open-top hopper or gondola railcars, and shall have a marked capacity sufficient to hold 118 net tons of lading without exceeding 286,000 pounds gross-weight-on-rail ("GWOR"). Such railcars shall also meet or exceed the Association of American Railroad ("AAR") Interchange Rules, as amended from time-to-time.

**Jeff W. Maler**  
Assistant Vice President - Energy

**UNION PACIFIC RAILROAD**  
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260  
ph. (402) 544-4602 fx. (402) 233-3039  
[jwmaler@up.com](mailto:jwmaler@up.com)

Transportation is subject to provisions of the AAR Interchange Rules, including those rules governing railcar repair, maintenance, damage, or destruction, in a manner prescribed by the "Field Manual of Interchange Rules" and the "Office Manual of the Interchange Rules" adopted by and currently in use by the AAR. Railcars must also comply with Item 226 of UP Circular 6603-Series as amended from time-to-time.

**Train Size:** Minimum of 130 cars and maximum of 135 cars loaded at 118 net tons per car.

**Service:** UP shall use reasonable efforts to transport Coal based on the circumstances when the transportation occurs. UP shall not be responsible for delays due to weather, track maintenance or construction, equipment failures, Acts of God, embargoes, labor activities including strikes, denial of or limitation of access to track controlled by any party other than UP, or events outside control of UP.

<b>Rates:</b>	<b><u>Origin Mine</u></b>	<b><u>Rate</u> <u>(U.S.\$/net ton)</u></b>
	Caballo Mine:	\$22.89
	Belle Ayr:	\$22.95
	Caballo Rojo:	\$22.90
	Cordero:	\$22.82
	Coal Creek:	\$22.54
	West Thunder:	\$22.46
	Jacobs Ranch:	\$22.41
	Black Thunder:	\$22.41
	South Black Thunder:	\$22.26
	No. Antelope/Rochelle:	\$21.98
	Antelope:	\$21.92

These rates are not subject to any fuel surcharge.

**Other Applicable Terms:** UP Circular 6603-Series, including but not limited to, Item 125 Other Rules, shall apply to the extent the specific provisions of the published price document do not supersede those rules. [A link to UP Circular 6603 is enclosed.]

**Changes:** The rates and terms may change at any time at rail carrier's discretion so long as 20 days-notice is provided for any increase.

**Jeff W. Maier**  
Assistant Vice President - Energy

**UNION PACIFIC RAILROAD**  
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260  
ph. (402) 544-4502 fx. (402) 233-3039  
jwmaier@up.com

**Publication:**

The rates and service provisions described in this attachment shall be published in a UP price document on or before December 11, 2008 to be effective on January 1, 2009.

**Jeff W. Malar**  
Assistant Vice President - Energy

**UNION PACIFIC RAILROAD**  
1400 Douglas Street, Stop 1260, Omaha, Nebraska 68179-1260  
ph. (402) 544-4502 fx. (402) 233-3039  
jwmalar@up.com



## **EXHIBIT I-2**



## **UP TARIFF 4221**

### **UNIT TRAIN COAL COMMON CARRIER TARIFF**

**Publication of rates, terms and conditions applying on:**

**Unit Coal Trains with movement from, to or via the  
Union Pacific Railroad Company**

**Issued By:  
G. H. OSLER - MANAGER PRICING SERVICES  
K. A. EYMANN - MANAGER PRICING SERVICES**

**Union Pacific Railroad Company  
1400 Douglas Street Omaha, NE 68179**

**Issued  
Effective**      **December 11, 2008  
January 1, 2009**

**UP 4221**



UP 4221

## TARIFF ITEM CHECKLIST

Item Number	Item/Rule Description	Version	Effective Date	Expiration Date
1	DEFINITION OF ITEM SYMBOLS		01/01/2009	12/31/2100
5	GOVERNING RULES		01/01/2009	12/31/2100
11	REVISIONS/CANCELLATIONS		01/01/2009	12/31/2100
100	GENERAL RULES AND DEFINITIONS		01/01/2009	12/31/2025
4200	PRB TO LADUE		01/01/2009	12/31/2025
5400	PRB TO FT GIBSON	A	01/01/2009	12/31/2025

Issued December 11, 2008  
Effective January 1, 2009

UP 4221



UP 4221

**Item: 1**  
**DEFINITION OF ITEM SYMBOLS****DEFINITION OF ITEM SYMBOLS**

A - Add  
C - Change  
D - Decrease  
I - Increase  
X - Expire



UP 4221

**Item: 5**  
**GOVERNING RULES**
**GOVERNING RULES DOCUMENTS**

This publication is governed, except as otherwise specifically provided herein, by the provisions of publications below as amended from time to time

Bureau of Explosives	BOE 6000-series
Directory of Hazardous Materials Shipping Description	(Issued by RAILINC)
Official Railroad Station List	OPSL 6000-series
Official Railway Equipment Register	RER-series
Standard Transportation Commodity Code	STCC 6001-series
Uniform Freight Classification	UFC 6000-series
Union Pacific Railroad Company Accessional Tariff	UP 6004-series
Union Pacific Railroad Governing Rules for Regulated Traffic	UP 6007-series
Union Pacific Railroad General Rules for Coal Trains	UP 6602-series, UP 6603-series, and UP 6605-series
Association of American Railroads "AAR Interchange Rules" Manual	(Issued by AAR)
Association of American Railroads "Open Top Loading Rules Manual"	(Issued by AAR)



UP 4221

**Item: 11  
REVISIONS/CANCELLATIONS****REVISIONS/CANCELLATIONS**

Unless otherwise provided, as this Pricing Document (or items contained herein) is revised, current letter suffixes cancel prior suffixes. Letter suffixes will be used in alphabetical sequence starting with A. Example, Pricing Document 3000-A cancels 3000, 3000-B cancels 3000-A, item 100-A cancels Item 100, Item 100-B cancels Item 100-A.



UP 4221

**Item: 100**  
**GENERAL RULES AND DEFINITIONS**

## General Rules and Definitions

For purposes of applying this Tariff, the following will govern

**Commodity/Coal:** Coal, a mineral substance whose Standard Transportation Commodity Code (STCC) as set forth in the Standard Transportation Commodity code tariff ICC STCC 6001-Series, begins with the two digits 11

**Origin(s):** Coal mine origins as specified in individual Rate Items

**Destination(s):** Rail station capable of receiving trainloads of Coal as specified in individual Rate Items

**Shipper:** Party who is paying the freight charges under this Tariff Shipper shall have the same meaning as Customer

**UP:** Union Pacific Railroad Company

**Railroad:** UP and any other rail carrier that is a party to this Tariff for a joint rate to the specified Destination as listed in Items 1000-9999 of this Tariff

**Rates:** Are in U S dollars and cents per net ton of 2,000 lbs Rates apply only for Coal consumed at the station(s) noted in the Item Description of the Rate Item, unless otherwise provided Railroad may adjust or cancel Rates subject to 20 days' notice for increases

**Rate Item:** Schedule of Rates, charges, and terms applicable to particular Destination, as listed in Items 1000-9999 of this Tariff

**Diversions:** Diversions may be permitted under certain circumstances, as provided in UP Circular 6602-series, 6603-series or 6605-series

**Request for Service:** Transportation under this Tariff will take place on lines which are subject to intense use and operational limitations In order to maximize the utilization of the rail lines and loading facilities for the benefit of all parties involved in transportation of Coal from Origins, UP must coordinate with the mine operators and Shippers Shipper requesting transportation under this Tariff must provide a "Monthly Coal Tonnage Forecast" as provided in Item 250 of UP Circular 6602-series, 6603-series or 6605-series That Item defines the monthly process for the submission of forecasts by both the receivers of coal and the producers who will load those tons for shipment via UP This condition applies in addition to any specific notice requirements stated in this Tariff

**Shipper Owned or Leased Equipment:** Railcars owned, leased or otherwise furnished by Shipper for transportation under this Tariff

**Railroad Owned or Leased Equipment** Railcars owned, leased or otherwise furnished by Railroad, subject to availability, for transportation under this Tariff

**Equipment:** If Rate Item for Destination specifies Shipper Owned or Leased Equipment, Shipper will provide suitable equipment at no charge to Railroad Railcars shall be compatible with the loading facility and the unloading facility

All railcars used for transportation under this Tariff shall be open-top hopper or gondola railcars, and shall have a marked capacity sufficient to meet the Minimum Lading Weight per Railcar as specified in the Rate Item for

Issued December 11, 2008  
 Effective January 1, 2009  
 Expiration December 31, 2025

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 Item 100  
 Continued on next page

**Destination**

Loaded railcars shall not exceed the maximum gross-weight-on-rail ("GWOR") associated with the route of movement, but in no case greater than 286,000 lbs. In some corridors the GWOR will be less than 286,000 lbs, in which case Railroad will note in the applicable Rate Item the maximum weight capability on the route of movement.

Such railcars shall also meet or exceed the Association of American Railroads ("AAR") Interchange Rules, as amended from time to time, and shall have been inspected and approved by UP for safety in accordance with Federal Railroad Administration ("FRA") regulations, as amended from time to time. Railcars must also comply with Item 226 of UP 6602-series, 6603-series and 6605-series.

Transportation under this Tariff is subject to the provisions of the AAR Interchange Rules, including those rules governing railcar repair, maintenance, damage, or destruction, in a manner prescribed by the "Field Manual of Interchange Rules" and the "Office Manual of Interchange Rules" adopted by and currently in use by the AAR.

**Maximum Volume:** The maximum volume that Railroad will transport under each Rate Item is specified in the Rate Item.

**Trainsets:** UP reserves the right, in its sole judgment, to limit the number of trainsets that will be in service pursuant to each Rate Item in order to retain fluidity or to meet loading schedules, or if adding trainsets in active service would not materially increase delivered tonnage.

**Annual Volume Estimate:** For planning purposes, Shipper shall advise Railroad of its intent to ship under this Tariff as specified in Monthly Coal Tonnage Forecast. In addition, not later than July 1 each year, Shipper shall provide to Railroad an estimate of tons of Coal anticipated to be loaded in the next calendar year by month ("Annual Volume Estimate"). This information should include tons from each of its suppliers and origins as soon as it is known. The nominated tonnage must be ratable. A monthly nomination is ratable if it is no more than 10% greater or 10% less than one-twelfth of the annual total. If Shipper decides to begin shipments within any time-frame other than a full calendar year basis, then Shipper shall provide Railroad an Annual Volume Estimate for the remaining months of that calendar year, at least ninety calendar days prior to the first shipment, unless otherwise mutually agreed. The Annual Volume Estimate must be submitted electronically via UP's secured website ([www.uprr.com/customers/energy/Bulk Train Planner](http://www.uprr.com/customers/energy/BulkTrainPlanner)), and may be revised at any time prior to October 1 each year.

**Service:** Railroad shall use reasonable efforts to transport Coal based on the circumstances when the transportation occurs. Railroad shall not be responsible for delays due to weather, track maintenance or construction, equipment failures, embargoes, Acts of God, labor activities, including strikes, denial of or limitation of access to track controlled by any party other than Railroad, excessive demand, or events outside the control of the Railroad. Railroad intends to use reasonable efforts to deliver the Annual Volume Estimate and the Monthly Coal Tonnage Forecast furnished by Shipper but has no binding obligation to comply with these planning estimates.

In no event shall Railroad be liable for any service guarantee. Further, to the extent allowed by law, under no circumstances will Railroad be liable for any direct, indirect, actual or consequential damages or any other liability, or additional costs of any kind arising out of or caused by service interruptions, reductions, or excessive demand.

**Freight Charges:** Freight charges shall be calculated based on the greater of the actual lading weight of all Coal in a train as determined by weighing pursuant to the rules in UP Circular 6602-series, 6603-series or 6605-series, or the minimum tender per shipment weight, which is specified by Destination in the Rate Item.

**Payment:** Railroad may invoice Shipper by means of mail or electronic transfer of documentation. Shipper shall pay the amount invoiced by means of mail or electronic transfer of funds within 15 calendar days after date of invoice. Late payment and other credit terms shall be in accordance with UP's credit terms as published in Rule 62 of UFC 6000-series. If Shipper fails to pay in accordance with the requirements or if, in UP's sole discretion, adverse credit conditions occur which could affect Shipper's ability to meet payment terms, UP may revoke credit privileges and institute any one or more of the Revocation of Credit and Other Remedies procedures outlined in UFC 6000-series.



**Notices:** Notices to UP should be addressed to

Attn: General Director- Logistics and Demand  
 Union Pacific Railroad  
 Marketing and Sales Energy Group  
 Stop 1260  
 1400 Douglas Street  
 Omaha, NE 68179  
 Fax (402) 501-0163

**Other General Rules:** Shipments made under this Tariff shall be subject to Circular UP 6602-series, 6603-series or 6605-series or their successors, which contain the General Loading Rules, Accessorial Charges and Fuel Surcharge for Coal Trains moving via UP, and related items


Services or other matters not specifically addressed in this Tariff shall continue to be governed by and paid for in accordance with rules, regulations, statutory provisions and provisions of the applicable tariffs, rules circulars, publications or in other applicable rate and service terms established under 49 U.S.C. Section 11101 or 10702. Such rules, regulations and provisions, as amended from time to time, are herein incorporated by reference without being specifically listed. To the extent any such rules, regulations or provisions as they relate to the parties hereto are inconsistent with the terms of this Tariff, the terms of this Tariff shall govern. When reference is made in this Tariff to tariffs, circulars, items, notes, rules, etc., such references are continuous and include revisions and supplements to and successive issues of such tariffs, circulars, items, notes, rules, etc.

In the event of any conflict between the terms of this Tariff and the terms of the Rate Item, the provisions of the Rate Item shall govern.

Issued December 11, 2008  
 Effective January 1, 2009  
 Expiration December 31, 2025

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 Concluded on this page

 <div style="display: inline-block; vertical-align: middle;"> <b>UP 4221</b> </div>	<b>Item: 5400-A</b> <b>Itm Desc: OK, Ft Gibson, Muskogee Generating Station</b>
<b>Unit Coal Trains from SPRB to Muskogee Generating Station, Ft. Gibson, OK</b>	
<b>For billing purposes use the following rate authority: UP 4221-5400-A</b>	
<b>STCC/GROUP</b>	<b>DESCRIPTION</b>
<b>11</b>	<b>Coal</b>
<b>GENERAL RULE ITEM 5400</b> Rates in this item are not subject to fuel surcharge  The Maximum Volume that Railroad will transport under this item is 7,000,000 Net Tons per calendar year  Not more than 9 Trainsets may be placed in service for transporting Coal to Destination	
<b>GENERAL APPLICATION RULES FOR ITEM 5400-A</b>	
1 Mileage allowance payment on private equipment will not apply  2 Free time to unload will be 6 hour(s)  3 Applies if minimum tender per shipment is 130 Car(s) and maximum not greater than 135 Car(s)	
<b>APPLICATION AND RATES</b>	
<b>COLUMN</b>	<b>RATE APPLICATION RULES</b>
<b>1</b>	Rates are in U S dollars Per Net Ton  Subject to a minimum lading weight of 118 tons per car  Applies in shipper owned or leased equipment
<b>STCC</b>	<b>Rate</b>
<b>11 Coal</b> <b>To: OK, FT GIBSON</b> <b>From:</b>	
WY, ANTELOPE MINE	18 75
WY, BELLE Ayr MINE	19 67
WY, BLACK THUNDER MINE	19 17
WY, BLACK THUNDER SOUTH	19 05
WY, CABALLO MINE	19 70
WY, CABALLO ROJO MINE	19 64
WY, COAL CREEK MINE	19 49
WY, CORDERO MINE	19 53
WY, JACOBS RANCH MINE	19 17
WY, N ANTELOPE MINE	18 81
WY, ROCHELLE MINE	18 81
WY, THUNDER WEST MINE	19 23
Issued December 28 2008 Effective January 1, 2009 Expiration December 31, 2025	<b>UP 4221</b>
Page 1 of 2 Item 5400-A Continued on next page	

APPLICATION AND RATES		
COLUMN	RATE APPLICATION RULES	
1	<p>Rates are in U S dollars Per Net Ton</p> <p>Subject to a minimum lading weight of 118 tons per car</p> <p>Applies in railroad owned or leased equipment</p>	
	Coal Rate	Route Code/Group
STCC: 11 Coal		
To: OK, FT GIBSON		
From: WY, ANTELOPE MINE	21 11	UP
WY, BELLE AYE MINE	22 14	UP
WY, BLACK THUNDER MINE	21 58	UP
WY, BLACK THUNDER SOUTH	21 45	UP
WY, CABALLO MINE	22 17	UP
WY, CABALLO ROJO MINE	22 12	UP
WY, COAL CREEK MINE	21 94	UP
WY, CORDERO MINE	21 99	UP
WY, JACOBS RANCH MINE	21 58	UP
WY, N ANTELOPE MINE	21 18	UP
WY, ROCHELLE MINE	21 18	UP
WY, THUNDER WEST MINE	21 65	UP
NOTES	DESCRIPTION	

## **EXHIBIT I-3**

THOMAS W. WILCOX  
 202 274 2913 telephone  
 202 654 5608 facsimile  
 tom.wilcox@troutmansanders.com  
 Admitted in DC

# TROUTMAN SANDERS

TROUTMAN SANDERS LLP  
 Attorneys at Law  
 401 9th Street, N.W.  
 Suite 1000  
 Washington, District of Columbia  
 20004-2134  
 202 274 2950 telephone  
 202 274 2994 facsimile  
 troutmansanders.com

November 21, 2008

## VIA HAND DELIVERY

The Honorable Anne K. Quinlan  
 Acting Secretary  
 Surface Transportation Board  
 395 E Street, SW  
 Washington, DC 20423



Re: **STB Docket NOR 42111, *Oklahoma Gas & Electric Company v Union Pacific Railroad Company***

Dear Ms. Quinlan:

Enclosed for filing in the above-captioned docket please find the original and ten (10) copies of the Joint Stipulation and Report on the Parties' Conference Pursuant to 49 C.F.R. § 1111.10(b). The filing contains a joint stipulation, as well as a proposed procedural schedule and a proposed protective order that the parties request the Board to adopt.

Three compact disks with the text of the proposed protective order in MSWord format are also included. An extra paper copy is included for date-stamping and return to the undersigned.

Please feel free to contact me if you have any questions.

Sincerely,

Thomas W. Wilcox

Enclosure

cc: Michael L. Rosenthal, Esq. (counsel for Defendant)  
 Patrick D. Shore, Esq.  
 Allen F. Gould

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



OKLAHOMA GAS & ELECTRIC COMPANY

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY

Defendant.

Docket NOR 42111

**JOINT STIPULATION AND  
REPORT ON THE PARTIES' CONFERENCE  
PURSUANT TO 49 C.F.R. § 1111.10(b)**

Complainant Oklahoma Gas & Electric Company ("OG&E") and Defendant Union Pacific Railroad Company ("UP") have conducted a conference as required by 49 C.F.R. § 1111.10(b) to discuss discovery and procedural matters. In addition, the parties have agreed on certain stipulated matters to govern the proceedings in this docket. The parties' agreement and a summary of the discussions are set forth below.

**I. JOINT STIPULATION**

1. For purposes of this case only and for no other purpose, UP waives its right to claim that a stand-alone cost ("SAC") analysis would justify rates greater than 180 percent of the variable costs of providing the subject transportation service as calculated pursuant to the Board's procedures ("Variable Costs"), and stipulates that the maximum reasonable rates for the subject transportation service are 180 percent of Variable Costs. UP also waives its right to contest whether there is qualitative evidence of effective competition from other carriers or

modes of transportation for the transportation to which the rates apply because UP could not prevail on that issue under the standards currently being applied by the Board.

2. OG&E believes that the Revenue-to-Variable Cost ratios produced by the challenged rates exceed the Board's jurisdictional threshold of 180 percent. OG&E also believes that the results of a proper SAC analysis would produce SAC rates for the issue movements lower than the Board's jurisdictional threshold. Accordingly, OG&E joins in UP's stipulation as set forth in paragraph 1.

3. The parties also stipulate that the proper time period for the traffic and operating characteristics used to initially calculate Variable Costs in this case is November 1, 2007 to October 31, 2008.

4. The parties further stipulate that the only issues for the Board to decide in this case are whether the challenged rates exceed the Board's jurisdictional threshold of 180 percent and, if so, what is the maximum reasonable rate.

## **II. REPORT ON PARTIES' CONFERENCE**

The parties also met by conference call on November 14, 2008 and discussed procedural and discovery matters as required by 49 C.F.R. § 1111.10(b). The results of the conference are set forth below.

1. The parties have agreed upon a Protective Order to facilitate discovery by protecting confidential materials and information in the event that such materials are produced and/or included in evidentiary filings in this case. The proposed Protective Order attached as Exhibit A is virtually identical to that adopted by the Board in recent stand-alone cost rate cases.<sup>1</sup>

---

<sup>1</sup> See, e.g., *Seminole Electric Cooperative, Inc v CSX Transportation, Inc.*, Docket 42110 (served October 22, 2008) The proposed Protective Order differs from other recently adopted orders by allowing in-house counsel for each party to retain a copy of pleadings containing the

The parties respectfully request that the Board enter the attached Protective Order for use in this case.

2. In light of their Joint Stipulation to limit this case to issues involving jurisdictional costing and their efforts to accommodate the scheduling constraints of counsel, the parties request that the Board adopt the following procedural schedule for this case:

<u>Due Date</u>	<u>Event</u>
December 1, 2008 <sup>2</sup>	UP's Answer to Complaint
December 5, 2008	UP production of UP variable cost data covering the time period November 1, 2007 to October 31, 2008
December 19, 2008	OG&E production of OG&E variable cost data, if necessary
January 9, 2009	Joint submission of operating characteristics
January 16, 2009	Staff-supervised technical conference, if necessary
January 23, 2009	Simultaneous Filing of Opening Evidence
February 13, 2009	Simultaneous Filing of Reply Evidence

### III. CONCLUSION

Given the parties' agreement on the Protective Order and procedural schedule, the parties respectfully request that the Board issue an appropriate order at its earliest convenience.

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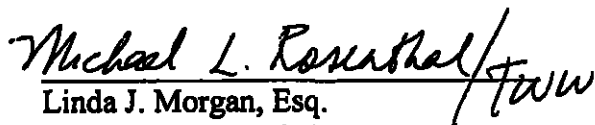
other party's confidential and highly confidential information because such information will be limited to the data used to calculate variable costs.

<sup>2</sup> The due date for UP's Answer was mutually extended beyond the 20 day period in 49 C.F.R. § 1111.8 because of the intervening Thanksgiving Day holiday.



Each party reserves the right to (i) request that the Board change the due dates referenced above; (ii) request that the Board order briefs to be filed after the completion of the evidentiary record; and (iii) oppose any requests referenced in (i) and (ii) above.

Respectfully submitted,



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November 21, 2008

## EXHIBIT A

**PROTECTIVE ORDER**

STB Docket No. 42111

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as "material") in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
  - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
  - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
  - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings filed with the Board.
  - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." If any party wishes to challenge such designation, the party may bring such matter to the attention of

the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to designate the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.
7. Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts would be properly discoverable in this proceeding but for the confidentiality provision(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 7 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
  
10. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's "HIGHLY CONFIDENTIAL" material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a "CONFIDENTIAL" version of the pleading or evidence from which the filing party's "HIGHLY CONFIDENTIAL" material has been redacted. The "CONFIDENTIAL" version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel").
  
11. Any party filing with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING  
CONFIDENTIAL MATERIAL

I, \_\_\_\_\_, have read the Protective Order served on \_\_\_\_\_ [ date ], governing the production of confidential documents in STB Docket No. 42111, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42111 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_

Dated: \_\_\_\_\_

# UNDERTAKING HIGHLY CONFIDENTIAL MATERIAL

As outside [ counsel ] [ consultant ] for \_\_\_\_\_, for which I am acting in this proceeding, I have read the Protective Order served on \_\_\_\_\_ [ date ], governing the production of confidential documents in STB Docket No. 42111, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: \_\_\_\_\_



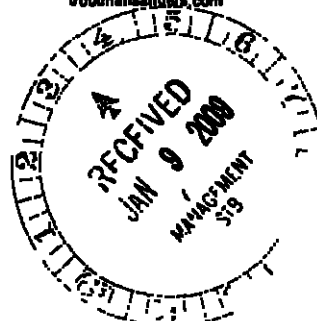
## **EXHIBIT I-4**

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January 9, 2009



## VIA HAND DELIVERY

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

**Re: STB Docket NOR 42111, *Oklahoma Gas & Electric Company*  
*v. Union Pacific Railroad Company***

Dear Ms. Quinlan:

Enclosed for filing in the above-captioned case please find the Joint Submission of URCS Phase III Operating Characteristics of Oklahoma Gas & Electric Company ("OG&E") and the Union Pacific Railroad Company ("UP"). The original and ten (10) copies are enclosed. An additional copy is included for date-stamping and return via our messenger.

Please note that the attachments to the Joint Submission contain Confidential Information which is redacted from the Public Version. Therefore, the parties are also filing, under seal and pursuant to the Protective Order in effect for this proceeding, the original and ten (10) copies of the Confidential Version. An additional copy of the Confidential Version is also enclosed for date-stamping and return via our messenger.

Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads 'Thomas Wilcox'.

Thomas W. Wilcox

Enclosure

cc: Michael L. Rosenthal, Esq (counsel for Defendant)  
Patrick D. Shore, Esq.  
Allen F. Gould

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

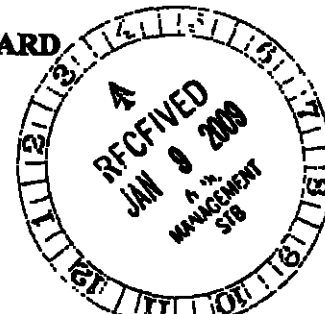
OKLAHOMA GAS & ELECTRIC COMPANY

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY

Defendant.



Docket NOR-42111

**JOINT SUBMISSION OF URCS PHASE III  
OPERATING CHARACTERISTICS**

Complainant Oklahoma Gas & Electric Company ("OG&E") and Defendant Union Pacific Railroad Company ("UP") hereby jointly submit operating characteristics pursuant to the decision the Surface Transportation Board ("Board" or "STB") issued on December 3, 2008 in this case. The nine (9) operating characteristic inputs to the Uniform Rail Costing System ("URCS") for each of the movements covered by the Complaint<sup>1</sup> are attached as Attachments 1 and 2.

The nine inputs cover the one-year time period from November 1, 2007 through October 31, 2008 and will be used by the parties in this case to calculate the variable costs and jurisdictional threshold for each of the movements covered by the Complaint pursuant to the Joint Stipulation filed on November 21, 2008. The inputs reflect actual movement characteristics for transportation from the Wyoming Southern Powder River Basin mines from which UP transported coal to the Muskogee Station during the data period, and average

<sup>1</sup> See letter dated January 6, 2009 from OG&E counsel to Anne Quinlan, Acting STB Secretary, filed in this docket on January 6, 2009

movement characteristics for UP-served mines from which OG&E did not purchase coal during the data period. Due to the agreement between the parties on these operating characteristics, the parties do not believe it is necessary to hold a discovery conference supervised by Board staff. Both OG&E and UP are making this joint submission without prejudice to their positions in this case.

The parties respectfully request that the Board adopt the nine inputs for each subject movement for use in the URCS Phase III calculations in this case.

Respectfully submitted,



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Electric Company*

January 9, 2009

# ATTACHMENTS

**REDACTED**

## **EXHIBIT II-A-1**

**REDACTED**



## **EXHIBIT II-A-2**

**REDACTED**